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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1440

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut,
Appellant,

vs.

SUSAN ROE, et al.,
Appellee.

On Appeal from the United States District Court for the District of Connecticut

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE~~

and

BRIEF OF JANE DOE, AMICUS CURIAE

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MOTION OF JANE DOE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

The National Health Law Program moves this Court for leave to file a brief amicus curiae in support of Appellee on behalf of Jane Doe and others similarly situated. Jane Doe is the named Plaintiff in *Westby v. Doe*, No. 75-813, on ap-

peal to this Court. She is a 28 year old resident of Pennington County, South Dakota, who receives Aid to Families with Dependent Children. The state officials who administer the South Dakota Medicaid Program refused to authorize payment for an abortion which she sought from her physician, resulting in litigation[1] of the same issues presented to this Court in *Beal v. Doe*, No. 75-554, and *Maher v. Roe*, No. 75-1440, the instant case.

The National Health Law Program is a national Legal Services Corporation-funded support center whose responsibilities include: researching legal aspects of health problems of the poor, developing legal techniques to remedy these problems and providing assistance to legal services attorneys throughout the country, such as those at Black Hills Legal Services, and their poverty clients who have difficulty obtaining high quality health care services. In this capacity Program attorneys have participated generally in litigation to obtain benefits for Medicaid recipients to which they are entitled under federal law and specifically in several of the Medicaid abortion cases which are pending in federal courts throughout the nation. Jane Doe, as a client of Black Hills Legal Services and the National Health Law Program, represents the interests of Medicaid eligible women in the many states which restrict payment for abortion under Medicaid.

Jane Doe requests leave to file this brief to bring the Court an issue which is not fully addressed by the records in *Beal v. Doe*, No. 75-554, and *Maher v. Roe*, No. 75-1440, the cases which the Court has chosen to hear on the Medicaid abortion question. Amicus supports and concurs in all of Appellees' and Respondents' arguments and further urges the Court to determine fully the issue of to what extent a state may refuse

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[1] *Doe v. Westby*, 383 F. Supp. 1143 (D. S.D. 1974), vacated and remanded, 420 U.S. 968 (1975); opinion on remand, 402 F. Supp. 140 (D. S.D. 1975), appeal docketed Dec 8, 1975, No. 75-813.

to pay under its Medicaid program for any abortions which the state deems not "medically necessary" or "medically indicated." The state's position in *Maher* is similar to that advanced by the Solicitor General in his brief in support of Pennsylvania's petition for certiorari in *Beal v. Doe*, that a certificate of medical necessity may be required within the constraints of *Doe v. Bolton*, 410 U.S. 179 (1973). The records in *Beal* and *Maher* do not reveal the effects of a certificate such as the Solicitor proposes, but the trial records in *Westby v. Doe*, No. 75-813, and *Toia v. Klein*, No. 75-1749, demonstrate the serious problems which the requirement of a certificate would present. Because the limits of the definition of medical necessity for purposes of Medicaid payment for abortion are at issue in several other federal district court cases, amicus urges this Court to resolve finally and completely the medical necessity question, which has caused physicians, state administrators and Medicaid recipients considerable confusion concerning the term "medically necessary" that has unduly interfered with Medicaid eligible women's right to obtain medical treatment from competent, ethical medical practitioners.

Appellant and Appellee have consented to the filing of this brief. See Appendix herein.

BRIEF OF JANE DOE, AMICUS CURIAE

I. ARGUMENT

A. The Medicaid Program.

Funded jointly by the state and federal governments, the federal program of medical assistance for the indigent, "Medicaid", is a state-administered program which pays for the costs of medical care for most welfare recipients and certain other poor individuals.[2] 42 U.S.C. § 1396 *et seq*. States are not required to participate in Medicaid, but if they choose to do so, they must comply with the federal statutes and regulations which outline general program parameters. *Townsend v. Swank*, 404 U.S. 282 (1971), *King v. Smith*, 392 U.S. 309 (1968). Participating states must establish state plans which detail the groups of persons covered, types of services offered and conditions which providers of health care under the program must meet.

Federal law requires states to provide to recipients of the federal welfare programs (AFDC, 42 U.S.C. § 600 *et seq*., and SSI, 42 U.S.C. § 1380 *et seq*.), the "categorically needy," at least seven basic services: physician services, X-ray and laboratory services, inpatient hospital services, outpatient hospital services, nursing home services, family planning services and early childhood health screening. 42 U.S.C. §§ 1396a(a)(10), (13)(B) and 1396d(a)(1)-(15). Just over half of the states also cover under Medicaid other poor persons who have too much income or resources to qualify for welfare, but who cannot afford health care and who are aged, blind or disabled or

[2] *See* generally, Butler, "The Medicaid Program: Current Statutory Requirements and Judicial Interpretations," 8 *Clearinghouse Review* 7 (1974), Stevens & Stevens, *Welfare Medicine in America* (1974).

dependent children within the meaning of federal law, the "medically needy", 42 U.S.C. § 1396a(10)(C). States covering the medically needy must provide either the basic seven services listed above or seven of the sixteen services listed in the Medicaid law, including some institutional and some non-institutional services, 42 U.S.C. § 1396d(a)(1)-(16). States may also provide virtually any other medical services such as drugs, eyeglasses or dental care, from this statutory list of optional services.

B. State Restrictions on Medicaid Payment for Abortion.

In response to this Court's 1973 *Roe v. Wade* and *Doe v. Bolton* decisions, 410 U.S. 113, 179, most states have repealed their plainly unconstitutional criminal prohibitions on abortions.[3] But many states have adopted laws which limit access to abortion by prohibiting Medicaid payment for abortion or requiring that abortions be "therapeutic", "medically indicated" or "medically necessary",[4] terms which are usually defined to be "a threat to the woman's life or health."

[3] *See, e.g.*, 2 *Family Planning/Population Reporter* 47-49, 80-81, 119 (1973).

[4] *See, e.g., Id.*, 3 *Family Planning/Population Reporter* 34 (1974); 4 *Family Planning/Population Reporter* 113 (1975); Rule 280.210, South Dakota Dept of Soc. Serv., *Doe v. Westby*, 383 F. Supp. 1143, 1145 (D. S.D. 1974); Conn. Welf. Dept. Pub. Ass. Prog. Manual, vol 3, Ch. III, §275; Mo. Rev. Stat. §208.152(12) (1973 Supp.); La. Dept. Pub. Welf. Memo No. 74-84 (June 17, 1974); Ohio Rev. Code §5105.55(c). New Hampshire Regulations, *see Coe v. Hooker*, 406 F. Supp. 1072, 1076 (D. N.H. 1976); Utah policy, *see Doe v. Rose*, 499 F. 2d 1112, 1113 (10th Cir. 1973); Pennsylvania statute, *see Planned Parenthood v. Fitzpatrick*, 401 F. Supp. 554, 578 (E.D. Pa. 1975); Minnesota regulations, *see Doe v. O'Bannon*, No. 4-74-Civ., D. Minn. Aug. 1, 1975; North Dakota regulations, *see Doe v. Myatt*, No. 43-74-48, D. N. Dak. Oct. 30, 1975; West Virginia regulations, *see Smith v. Tinder*, No. 75-0380CH, S.D. W. Va., Aug. 8, 1975.

With no attention to constitutional constraints, many states justify such restrictions on the ground that the federal Medicaid law authorizes payment of federal funds for only services that are medically necessary, since the preamble to the Medicaid Act describes the principal object of the program to be paying for

> "medical assistance on behalf of families with dependent children and of aged, blind or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396.

Another provision of the Act permits states to set "reasonable standards . . . for . . . the extent of medical assistance available under the program," 42 U.S.C. § 1396a(a)(17). This Court addressed the meaning of the term medically necessary in *Bolton*, where it was a corollary issue, and its language there does provide the foundation for resolving the confusion which surrounds the term. It will be seen that in the context of family planning decisions, the term "medically necessary" is constitutionally devoid of meaning. It is a red herring issue which states have used to camouflage their philosophical opposition to abortion.

C. **The Meaning of "Medically Necessary."**

The state of Connecticut's position in this case is that the Constitution permits states to distinguish between "necessary" and "unnecessary" abortions because it imposes this requirement upon payment for other Medicaid services. (Appellants' Brief at 7, 12). However, by defining medical necessity narrowly to mean only "medically or psychiatrically indicated" (brief at 4), the state ignores the Court's decision in *Bolton* that the term must include social, emotional, psychological and familial factors. Although the state maintains that the physician's certification of medical necessity "is never challenged" (brief at 4),

since the state's definition of medical necessity is unconstitutionally narrow, the physician certification requirement impermissibly infringes upon the physician/patient relationship by limiting the physician's ability to act in the patient's best interest. The state's position also ignores the fact that the question of medical necessity arises when pregnancy is diagnosed, not when the physician and patient choose the treatment for pregnancy. The Court thus must reject the state's argument on medical necessity.

This Court faced the issue of what constitutes a medically necessary abortion in *Doe v. Bolton*, when it upheld a section of the Georgia statute which makes it illegal for a physician to perform an abortion unless it is "necessary" based on "his best clinical judgment," 410 U.S. at 192-93. The Court assumed expressly that the physician would make a decision to abort based on physical, emotional, psychological and familial factors as well as the woman's age. *Id.* By adopting this analysis, the Court seems to have accepted the proposition that there are "medically unnecessary" abortions, apparently those where the patient is not actually pregnant or where the above-listed factors are absent and the physician acts contrary to the patient's best interests. These comments are apparently the source of some of the confusion on the medical necessity issue.

Underlying the Court's determination in *Bolton* and *Wade* that the right to privacy includes the abortion choice, 410 U.S. at 155-63, 198-99, is the unspoken assumption that pregnancy is a condition that requires medical treatment. Two alternative choices of treatment are abortion and prenatal care plus delivery. It is this choice of treatment for the acknowledged medical condition which states have restricted and which the Court decided was protected by the constitutional right to privacy. However, the underlying condition of pregnancy, not the choice of treatment, determines whether medical attention is "necessary".

A generally accepted definition of medical necessity is that care which is responsive to the problem for which it is being offered.[5] To apply this definition to any procedure requires that one first identify the condition or diagnosis for which the medical care is being offered and then determine whether the care is safe and efficacious for the condition. Pregnancy is a condition which is universally recognized in our modern society to require medical attention, although it is not an illness or disease and although it may be voluntary.[6] Therefore, once verifying that a patient is pregnant, to decide whether or not an abortion is necessary only requires determining whether it is a safe and efficacious response at certain medically recognized stages of pregnancy. Obviously abortion is such a response. Whether it is the appropriate choice for an individual woman is governed by the considerations enumerated by the Court in *Bolton* and is protected by the right to privacy.[7] Neither the choice of abortion nor that of medical care and delivery can be considered "unnecessary" despite the existence of an alternative form of

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[5] For an application of this definition, see Bunker, "Elective Hysterectomy: Pro and Con," 295 *New England Journal of Medicine* 267 (1976); *cf.* Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce, "Cost and Quality of Health Care: Unnecessary Surgery" (Jan. 1976).

[6] *Klein v. Nassau County Medical Center*, 347 F. Supp. 496, 500-01 *rev'd and remanded for reconsideration in light of Wade and Bolton*, 412 U.S. 924; remand decision, 409 F. Supp. 731 (E.D.N.Y. 1976); *Roe v. Ferguson*, 389 F. Supp. 387, 392 (S.D. Ohio 1974), *rev'd on other grounds*, 515 F. 2d 279 (6th Cir. 1975); *Doe v. Wohlgemuth*, 376 F. Supp. 173, 190 (W.D. Pa. 1974), *aff'd sub nom Doe v. Beal*, 523 F. 2d 611, 620-22 (3d Cir. 1975); *Coe v. Hooker*, 406 F. Supp. 1072, 1082-83 (D. N.H. 1976). *Cf. Roe v. Norton*, 408 F. Supp. 660, 663, note 3 (D. Conn. 1975).

[7] This Court's recent pronouncement on the extent of the right to choose abortion appears to indicate that the woman's interest in her health underlies the right to privacy. *Planned Parenthood v. Danforth*, — U.S. —, 96 S.Ct. 2831, 2840 (1976). However, the dissenting Justices, White, Burger and Rehnquist, correctly recognized that the right to choose abortion in *Wade* derives from the woman's interest in the effect of pregnancy upon her *life*. *Id.* at 2851-2852.

medical intervention, and despite the fact that those treatments appear to present different outcomes—a child or no child. Most forms of treatment for a given condition are designed to produce the same result, which may be why there is such reluctance to understand the foregoing analysis of the problem. However, viewed as medical care for the woman patient, both abortion and prenatal care plus delivery do produce the same result—a safe termination of the pregnant condition.

Under the postulated analysis, and consistent with the Constitution, a state may generally limit services for which it pays under Medicaid services in three ways: First, it may obviously limit services for which it pays under Medicaid to those which are safe and efficacious, *e.g.*, 42 U.S.C. § 1396a (a)(30), 45 C.F.R. §§ 250.18, 250.19. To do so is "in the best interests of the recipients," 42 U.S.C. § 1396a(a)(19). The Court recognized in *Wade* that with respect to abortions, this important state interest begins in the second trimester of pregnancy, 410 U.S. at 163, and permits a state to limit the facilities where abortions are performed, *Id.*

Second, under the discretion provided in the Medicaid statute, 42 U.S.C. §1396a(a)(10)(B), *Doe v. Beal*, 523 F.2d at 616 (3d Cir. 1975), a state may limit the *conditions* for which treatment will be provided at all, 523 F.2d at 620-21. Thus conditions which do not require medical attention, such as the shape of a nose, may be excluded from Medicaid treatment.

Finally, it is also possible that a state may limit a physician's choice of treatment for some conditions. It could, for example, refuse to pay for cosmetic surgery, which might be a physician's preferred choice of treatment for an emotional condition which a state might otherwise cover. *Doe v. Beal*, 523 F. 2d at 620. However, when the condition is pregnancy, this Court has declared that the physician and patient's *choice* of treatment is protected by the Constitution from state interference absolutely during the first trimester, and that during the

second trimester the state may only regulate the choice to protect the woman's health. 410 U.S. at 153-56. Therefore, regardless of whether a state may limit choice of treatment for some conditions, the Constitution prohibits it from imposing any choice of treatment for pregnancy.

The Solicitor General's brief suggests a compromise position which has dangerous appeal because its impact was not explored or tested in the trial courts in *Beal* or *Maher*. The federal government argues that physicians may be required to certify that abortions are "medically necessary" as the term is defined in *Bolton*, but that the state may not look behind the certification once it is made. Solicitor General's Brief at note 5, pp. 7-8. This position is distinguished from the state's position herein that it may require a physician's certificate of medical or psychiatric necessity which it does not question, but which does *not* expressly include the factors described in *Bolton* to be included in the term. As amicus will demonstrate, such a requirement as the Solicitor General suggests would significantly impair the physician's and patient's constitutionally protected right to choose the appropriate treatment for pregnancy.

D. **Requiring a Physician's Certificate of Medical Necessity Is Unconstitutional.**

The Court's discussion in *Bolton* suggests that a state may require a physician to certify that an abortion is "necessary", as that term is defined to include physical, emotional, psychological and familial factors. Yet the Court's opinion also suggests that a state may not challenge such a certificate of medical necessity, because the physician is presumed to consider those factors and act in the patient's best interest. Failure to do so is punishable by discipline of the state licensing boards. 410 U.S. at 200.

Several states do require that physicians certify that an abortion is "medically necessary" in order to be paid for performing the procedure for Medicaid eligible women.[8] The Solicitor General's brief approves this policy on the grounds that abortion requires the "exercise of medical judgment," Solicitor's brief at 7, and should "be the product of a medical determination," Solicitor's brief at 8. These remarks miss the thrust of the Court's express assumption in *Bolton* that physicians *do* make medical determinations and exercise medical judgment in advising patients about the choice of pregnancy treatment. In a footnote, the Solicitor General's brief does acknowledge that physicians should consider physical, emotional, psychological, familial factors and the woman's age, note 5, yet his subsequent arguments are inconsistent with this assumption.

Thus the Solicitor's brief begs the real question of the meaning of "medically necessary;" it argues for requiring physicians to execute a certification, but presumes (contrary to the state's position herein) that they will consider in their decisions all the factors which the Court declared in *Bolton* to be included in the term. Requiring a certificate which is presumed to derive from these factors and which a state may not challenge might seem to be a meaningless but harmless mandate. However, as the records in *Westby v. Doe* and *Toia v. Klein* demonstrate, such a requirement is confusing to administrators and physicians alike.

Some physicians, such as Jane Doe's physician in the *Westby* case, have their own definition of when a procedure is medically necessary, usually when a procedure is compelled by a threat to life or health. Yet they may prefer to apply a different standard to determine whether an abortion is in their patient's best interest. (Deposition of H. Benjamin Munson, M.D. in *Doe v. Westby*[9]) Requiring physicians to certify that an abortion is

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[8] *Supra* note 3.

[9] When asked for his definition of "medically necessary" Dr. Munson replied:

> Well, I would say a "necessary medical procedure"—I hardly ever use the word. I would say advisable, beneficial. Anything

medically necessary when that term is capable of several meanings has been demonstrated to inhibit physicians from performing abortions for Medicaid patients because they fear that the certificate may in fact be challenged or because they do not understand the term. *See, e.g.* Appellee's Motion to Affirm, *Toia v. Klein*, No. 75-1749, at 6-8.

Permitting states to impose this meaningless precondition of a certificate of medical necessity upon Medicaid abortion payment will continue to impair the physician-patient relationship and the physician's ability to prescribe the treatment of choice, both of which were guaranteed protection in *Bolton* and *Wade*. The requirement is thus quite pernicious and must be eliminated.

Other measures exist by which states can protect against the only types of "unnecessary" abortions which the Court implicitly recognized in *Bolton*: Those where the patient is not actually pregnant or where the physician acts contrary to the patient's express will or her informed judgment. To avert the problem of "abortional" acts upon women who are—negligently or intentionally—misdiagnosed as pregnant, states can and do license clinics, laboratories and physicians. To assure that the patient has freely participated in and concurs with the physician's decision, a state may require a written consent form, as this Court recognized last term in *Planned Parenthood Associa-*

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that's necessary, without which a person will die, of course that's necessary. Anything without which a person will suffer a serious embarrassment of health, I think that could be called necessary. Beyond that, I suppose very few things are really necessary. (Deposition of H. Benjamin Munson, M.D., June 7, 1974, at 13).

With respect to the "necessity" of an abortion for Jane Doe, his patient, Dr. Munson said:

> I think "necessary" is too strong of a word. No. I wouldn't say necessary, except in terms of preserving the reasonable health that she had, preserving it from depletion and overtiredness and the kind of things that would prejudice a person's general vitality. (*Id.* at 17.)

tion v. Danforth, — U.S. —, 96 S. Ct. 2831. 2839-2840 (June 29, 1976). By adopting these safeguards, a state can protect its legitimate interest that funds are not used to pay for fraudulent procedures or those where the woman does not consent to treatment.

II. CONCLUSION

The requirement that abortions be certified as medically necessary before they are eligible for Medicaid payment is unconstitutional because pregnancy has been acknowledged to be a condition requiring medical attention and the choice of how to terminate pregnancy—whether by abortion or delivery—has been held to be constitutionally protected from state interference until the point of fetal viability. The medical necessity question is answered once a state determines that a condition requires medical intervention or, at least, once a state determines that it will cover such conditions under its Medicaid plan. The term medical necessity has only a limited meaning in the context of pregnancy—to assure that pregnancy exists. The state may also assure that the woman concurs in the treatment decision. A certificate that an abortion is "medically necessary" is therefore meaningless, and might be innocuous were it not for the fact that imposing this meaningless and formalistic requirement has actually inhibited physicians from performing abortions upon consenting women for whom the physicians felt the procedure was in their best interest, as demonstrated by the record in *Toia v. Klein*.

Amicus urges the Court squarely to confront and dispose of this issue, although it is only indirectly raised by the parties in *Maher*, in order to avoid the necessity of further proceedings in *Westby*, *Klein* and other cases where the states' requirement inhibits the constitutionally protected interests of the physician

and patient to choose the most appropriate course of treatment for pregnancy.

Respectfully submitted,

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APPENDIX

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Message

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9/15/76

Dear Ms. Butler:

Please be advised that the plaintiff-appellees do not object to your filing an amicus curiae brief in Maher v. Roe, No. 75-1440, and we welcome your participation.

Very truly yours

/s/ Lucy V. Katz

State of Connecticut

Carl R. Ajello
Attorney General

Reply to:
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13 September 1976

Patricia A. Butler
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Dear Ms. Butler:

In reply to your letter dated September 7, 1976, I have no objection to your filing an *amicus* brief in support of the appellees in *Maher v. Roe*, No. 75-1440, *provided* that the participation of your organization as a federally funded Legal Services Corporation, in an abortion case, is not contrary to any federal law prohibiting such activity.

Very truly yours,

Carl R. Ajello
Attorney General
By Edmund C. Walsh
Assistant Attorney General

ECW:lp

cc: Lucy Katz, Attorney at Law

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